RECENT AMERICAN DECISIONS.

Supreme Court of Minnesota.

HERRICK v. MINNEAPOLIS AND ST. L. RAILWAY CO.

A cause of action which accrued in one state, under a statute of that state making every corporation operating a railroad in that state liable for all damages sustained by its employees in consequence of the negligence of other employees of such corporation when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed, may be maintained and enforced in another state, although there is in the latter state no similar statute, the common-law rule upon the subject prevailing.

The fact that such statute only applies to corporations operating railroads does not render it in conflict with the provision of the Fourteenth Amendment to the Federal Constitution, that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

APPEAL from an order of the District Court, Freeborn county.

Lovely and *Morgan*, for appellant.

J. D. Springer, for respondent.

MITCHELL, J.—The defendant owned and operated a line of railroad from Albert Lea, in this state, to Fort Dodge, in the state of Iowa. The plaintiff entered the service of defendant, in Iowa, as brakeman on one of its trains, to be operated wholly in that state. While coupling cars on his train, in the discharge of his duty in that state, plaintiff was injured through the negligence of the engineer in charge of the train, under such circumstances as to give him a right of action under a statute of Iowa, which makes every corporation operating a railway in that state liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by mismanagement of the engineers or other employees of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed: Section 1307, tit. 10, c. 5, Code of Iowa 1870. This action was brought to recover damages for the personal injury thus sustained in that state. The court below dismissed the action on the ground that the right of action thus accruing under the statute of Iowa could only be enforced in that state. The correctness of this ruling is the only question involved in this appeal.

The general rule is that actions for personal torts are transitory

in their nature, and may be brought wherever the wrongdoers may be found and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law. In actions *ex contractu* there is no such distinction, and there is no good reason why any different rule should be applied in actions *ex delicto*, whenever, by either common law or statute, a right of action has become fixed and legal liability incurred. That liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury.

The statute of another state, has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the state where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*. The defendant admits the general rule to be as thus stated, but contends that as to the statutory actions like the present it is subject to the qualification that to sustain the action the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers—notably, Rorer, Inter-state Law—seem to lay down this rule, but the authorities cited generally fail to sustain it. We have examined all the numerous cases cited on this point by defendant, and we find only one which in our opinion sustains him, while several are really against him. Most of the cases thus cited belong to one or the other of the two following classes: First, cases which hold that statutes giving a right of action for injuries causing the death of another

having no extra-territorial operation, only apply to injuries inflicted in the state which enacted the statute, and not to injuries inflicted or acts done in another state. Such is the case of *Whitford* v. *Railroad Co.*, 23 N. Y. 465. This undoubtedly is the settled law, but it does not touch the present case. The second class consists of cases which hold that where the statute gives such right of action to the personal representatives of the deceased, it can only be maintained by an administrator or executor appointed and acting under the laws of the state which enacted the statute, taking the ground that this right of action is not a right of property which passes to the estate, but is for the benefit of the family or next of kin of the deceased, and therefore the statute contemplates the exercise of the power and the execution of the trust only by a personal representative appointed under domestic laws. To this class belong the cases of *Richardson* v. *Railroad Co.*, 98 Mass. 85, and *Woodward* v. *Railroad Co.*, 10 Ohio St. 121. Some courts refuse to adopt this rule. But this question is not involved in the present case.

A few cases appear to lay some stress upon the fact that the statutes of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. Such is the case of *C., St. L. & N. O. Railroad Co.* v. *Doyle*, (Sup. Ct. Miss.) 8 Amer. & Eng. Ry. Cas. 171, in which after saying that the action may be asserted because of the coincidence of the statutes of the two states, the court adds: "And, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement; and our statute is evidence that the public policy of this state is favorable to such rights, instead of being inimical to them." But it by no means follows because the statute of one state differs from the law of another state, that therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another

state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens.

The only case which goes to the length of holding that this action can not be maintained, is that of *Anderson* v. *M. & St. P. Railroad Co.*, 37 Wis. 321, which, on the facts, is on all-fours with the present case, and in which the court holds that such an action will only lie in the state of Iowa, which enacted the statute. But with due deference to that court, and especially to the eminent jurist who delivered the opinion in that case, we think they entirely failed to distinguish between the *right of action*, which was created by the statute of Iowa and must be governed by it, and the *form of the remedy*, which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion.

The case of *Bettys* v. *Milwaukee & St. P. Railroad Co.*, 37 Wis. 323, was an action brought under an Iowa statute to recover *double* damages for cattle killed in Iowa. This case was probably correctly decided upon the second ground stated in the opinion, viz., that the statute was *penal*, and therefore could only be enforced in the state which enacted it

The following cases, we think, support our conclusion that this action may be maintained, although we have no such statute in this state: *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Leonard* v. *Steam Nav. Co.*, 84 N. Y. 48; *Chicago, St. L. & N. O. Railroad Co.* v. *Doyle*, *supra*; *N. & C. R. Co.* v. *Sprayberry*, 8 Baxt. (Tenn.) 341. See also, *Selma, Rome & Dalton Railroad Co.* v. *Lacy*, 43 Ga. 461, and S. C. 49 Ga. 10.

The defendant further contends that the statute of Iowa is in violation of the Fourteenth Amendment to the Constitution of the United States, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

The ground for this contention consists in the fact that the law does not apply to all persons, but only to railroad companies, thus imposing on them a liability not imposed on others. There is great danger that some of the provisions of this fourteenth amendment will be attempted to be applied to cases for which it was never designed. In view of the history surrounding its adoption, we doubt whether it was ever intended to apply to cases like the present. But, even if it was, we find nothing in this statute repugnant to its provisions. The provision of the constitutional amendment referred to does not surround the citizen with any protection additional to those before given under the constitutions of the states. It was not in the power of the states, before the adoption of this amendment, to deprive citizens of the United States of equal protection of the laws; the only change produced by making this constitutional principle a part of the federal constitution is to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by state law is complained of. If a state, in view of the peculiar nature of the service upon railroads, and the danger incident to it, shall, as a matter of state policy, require these corporations, which are the creatures of its statutes, to assume the risk of injuries to their servant, resulting from the negligence of fellow-servants also in their employ, we think they have a right to do so. Statutes imposing special duties and liabilities upon railroad companies are to be found on the statute-books of almost every state, and if general in their application to all such corporations they are valid: *McAunich* v. *Ry. Co.*, 20 Iowa 338; *Johnson* v. *Chicago, M. & St. P. Ry. Co.*, 13 N. W. Rep. 673.

Order reversed.

The principal case is one of great interest, both on account of the important principle involved, and because, on first perusal, it seems opposed to the weight of authority upon the subject. While, however, it may seem and perhaps is thus opposed to the mere weight of common-law authority, it is believed that upon principle—which ought to prevail when the question is a new one, as this was in the State of Minnesota—the decision is entirely philosophical and correct.

Without inquiring into the foundation of the so-called doctrine of comity, whether it exists *ex comitate* or *ex debito justitiæ*, as to which different opinions may perhaps still exist, we find a substantial agreement among the authorities as to the general statement of the extent of its application, at least so far as relates to contracts and common-law transitory torts. As stated in the principal case, we cannot see how the case can be in any manner affected by the question whether the right of action is statutory

or common law. The distinction between statutory and common-law rights made by some of the authorities has little to commend it. See Mr. Bigelow's note to sect. 625 of the eighth edition of Story's Conflict of Laws, and the cases there cited.

Mr. Story in his valuable work upon the Conflict of Laws, sec. 38: (the italics are our own), says: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is *inadmissible when it is contrary to its known policy or prejudicial to its interests.* In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

With reference to this same subject, Dr. L. Bar, of Göttingen, says:

"Obligations arising from delicts, and from circumstances of a kindred nature, furnish a general exception to the universal application of the *lex domicilii* to the import of obligations. The obligation arising from a delict may have as its subject, 1st, reparation for the damage done, and 2d, a penalty to be paid to the injured person.

"As far as regards these obligations under the first head, the rules of law in reference to them contain no more than such instructions as every one who lives in the state where they are in force must observe in his dealings with other persons and things that happen to be there. It is obvious that by failing in this responsibility, the foreigner becomes subject to these laws; and as every state requires this submission of the citizen of other states in its territory, it must always recognise the same submission of its own subjects to a foreign state. The law of the place where the prejudicial act was done, or the prejudicial circumstances happened, decides the obligation to make reparation. * * * The law of the place of action must also be kept in view to this effect, that *the judge can never recognise a claim which the ideas of his own law pronounce to be immoral or indecent*:" Bar's Int. Law (Soule & Bugbee's ed.), sect. 66, p. 272, 273. The italics in the last paragraph are our own.

According to these authorities a civil cause of action, accruing in a foreign country, will be enforced in the courts of the forum, except where it is contrary to the known policy of the country where the action is brought or prejudicial to its interests. As respects contracts, it is believed that the above principle will be accepted as correct in every common-law court.

As respects torts, however, we find in the English reports and text books a qualification added, thus:

Mr. Foote says: "The action complained of must have been a legal wrong, both by the law of the place where it was done and by the law of England, where the action for damages is brought:" Foote's Priv. Int. Law, Pt. III., ch. ix., p. 393. See, also, p. 390 *et seq.*

Mr. Westlake says: "The *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious: Westlake's Priv. Int Law, ed. of 1880, ch. xi., p. 221.

"Neither can any act be treated as a wrong in England which is not such in the defendant by the principles of English law, notwithstanding that the defendant is liable by the laws of the country where the act was done. But the English court admits the proof of the foreign law * * * as one of the facts upon which the existence of the tort or the right to damages may depend; * * * and it then applies and enforces its own laws so far as it is

applicable to the case thus established :' " Westlake's Priv. Int. Law, ed. of 1880, sect. 187, citing *The Halley*, L. R., 2 P. C. 193.

" But the last section (187) must be understood without prejudice to this, that an act may be treated as a wrong in England which is not such in the defendant by the English law otherwise than as adopting some rule of public international law :" Id., sec. 188, citing *The Nostra Signora de los Dolores* 1813, Dodson 290, in which Scott, a part owner of a privateer, was held liable for her acts, although by the English law in the narrower sense, as between British subjects, he would not have been so liable, because his name did not appear in her register. In this case the court said that the English statute was passed for reasons of domestic policy, and that all its regulations were of a domestic description, but considered that it had no force as against foreigners.

In *The M. Moxham*, L. R., 1 P. D. 107, 111, the law respecting personal injuries and respecting wrongs to personal property, is stated by MELLISH, L. J., to be perfectly settled, that no action can be maintained in the courts of England on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of England. The cases of *The Halley*, L. R., 2 P. C. 193, and *Phillips* v. *Eyre*, L. R., 6 Q. B. 1, are cited by this learned judge as conclusive upon the question. The case of *The Halley*, especially, is directly in point. That case was the case of a collision with a ship in foreign waters. By the law of the foreign country the ship was liable, and the owners were liable as owners of the ship; but by the law of England the ship and owners were not liable, because there was a pilot on board who was taken on board compulsorily, and who was navigating the ship, and the negligent act was his act. Upon this it was held, that notwithstanding the ship and the owners were liable according to the law of the country where the act was committed, yet inasmuch as they were not liable by the law of England, no action could be maintained against them.

Leaving the English authorities and referring to some American writers, we find Mr. Wharton laying down the rule as follows:

" The prevalent rule is, that to sustain an action for a tort committed abroad, the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of is the subject of legal redress :" Wharton's Conflict of Laws, sect. 478. To sustain this proposition he cites Westlake Int. Law, sect. 186; Foote Int. Law 394, and the cases cited by the former author, together with a number of American cases, of which, so far as we can discover, only the case of *Nashville Railroad* v. *Eakin*, 6 Cold. 582, supports the doctrine of the text as broadly as it is stated.

Judge COOLEY, in his work on Torts (p. 472), says:

" Where a new right of action is given by the statute for that for which no action would lie at the common law, such action can only be brought within the state or country whose statute gives the right, and for wrongs there suffered. This has often been decided under those statutes which give an action for causing death by wrongful act, neglect or default." To maintain this proposition the learned author cites *Whitford* v. *Panama Railroad Co.*, 23 N. Y. 465; *Richardson* v. *N. Y. Cent. Railroad Co.*, 98 Mass. 85, and *Woodward* v. *Mich., &c., Railroad Co.*, 10 Ohio St. 121 (all referred to in the principal case); and *State* v. *Pittsburgh, &c., Railroad Co.*, 45 Md. 41, and *Needham* v. *G. T. Railroad Co.*, 38 Vt. 294, in both of which cases

actions were brought upon the statutes of the forum for injuries happening in another state. In the former case it did not appear what, if any legislation, existed upon the subject in the other state, and therefore the common law was presumed to exist; and in the latter case the common law was assumed to exist in the state where the injury happened, by which no right of action was given.

It will be observed that the cases last above cited all belong to the first and second classes referred to in the principal case; and with the exception, perhaps, of the case of *Nashville Railroad* v. *Eakin*, 6 Cold. 582, no American case has been found that holds in accordance with the English rule that in all cases the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of can be the subject of legal redress. Of course all the authorities concur in holding that where the act is not wrongful by the law of the place where committed, it cannot be made unlawful by the statute of another state where the action is brought. Nearly all the cases cited by the American authors above quoted are cases of this description, and do not support the converse proposition that no action will lie where the act is actionable by the law of the place where committed, but not actionable by the law of the forum.

Referring now to the cases cited by the court as sustaining the decision in the principal case: in *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48, the action was brought in New York to recover damages for an injury done in Connecticut, and it appeared from the report of the case that the statutes of the two states upon this subject were substantially the same. In discussing the question, the court, per MILLER, J., after stating the rule that at common law personal actions, whether *ex contractu* or *ex delicto*, are transitory; that the right to recover in another state for an injury to the person for which the common law gives a remedy by action, rests upon the presumption that the common law prevails in the state where the injury was committed, and that the injured party could have recovered there had the action been brought in such state; and that the remedy in such cases is given by the courts of one country or state upon the principle of comity, which is due by one sovereign state or country to another under similar circumstances; proceeds to apply the same rule of comity to the case of similar statutes, stating that "in fact where there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both states relating to the subject prevailed." The case does not support the doctrine that the action would lie where the common law prevailed in only one of the states.

In *Selma, &c., Railroad Co.* v. *Lacy*, 43 Ga. 461, the court appear to have decided the case upon the same principle as that stated in the case last cited. In concluding his opinion, WARNER, J., said: "Inasmuch, therefore, as it does not affirmatively appear from the plaintiff's declaration that in the state of Alabama, where the injury is alleged to have been done, the laws of that state are similar to our own in respect to the injury for which redress is sought here under the provisions of our statute, or that the common law is not of force in that state in respect to the injury complained of, the court below erred in overruling the demurrer to the plaintiff's declaration." When the case subsequently came again before the court (49 Geo. 106), it was held that the court would be governed by the laws of its own state as to the mode of procedure in ascertaining the rights of the parties, but that what are their rights must be determined by the laws of Alabama, where the act complained of was done. In this case no right existing in

Alabama, there was none to be enforced in Georgia. While the rule of comity was assumed to be the basis of a decision enforcing the statute of another state, "not being contrary to the policy or prejudicial to the interests of this state," inasmuch as no cause of action appeared to exist in Alabama, the decision in question is negative in character, and not a direct authority in favor of the principal case.

In *Dennick* v. *Railroad Co.*, 103 U. S. 11, 17, Mr. Justice MILLER thus states the question before the court for decision: "It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages, which, under the statute of New Jersey, is imposed upon a party by whose wrongful act, neglect or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of the state. And the soundness or unsoundness of this proposition is what we are called upon to decide." And it was held that the suit could be maintained by the personal representative of the deceased appointed under the laws of New York. The argument of the court goes to the extent claimed in the principal case, but inasmuch as the statutes of New York and New Jersey appear to be based upon the same principle, the case is not an authority upon the precise question involved in the principal case.

The case of *Chicago, St. L., &c., Railroad Co.* v. *Doyle*, is sufficiently stated in the opinion in the principal case; and, while not authoritative upon the question involved in the principal case, does, by way of argument, support the conclusion arrived at in the principal case.

In the case of *N. & C. Railroad Co.* v. *Sprayberry*, 8 Baxt. 341, the proposition contended for in the principal case is stated baldly, without argument or citation of authority, which deprives it of much of the weight it would otherwise possess.

In this unsatisfactory state of the common-law authorities upon this question, we think the court decided wisely in placing its decision upon the principle so well stated by Judge STORY and Dr. BAR in the passages above quoted. Although the English authorities holding that the act must be a legal wrong, both by the law of the place where the act was done and where the action is brought, appear to have settled the question in England, the rule contended for in the principal case seems much more in accordance with the analogies of the law in other respects, and much more rational. In conclusion it would seem that upon principle the only limitations upon the liability of the defend ant, in a case like the principal case, in a state other than that where the act was committed, should be that the liability sought to be enforced shall not be contrary to the policy of the state where the action is brought, or prejudicial to its interests.

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